IN THE

Supreme Court of the United States

JUL 13 1967
JOHN F. DAVIS, CLERK

October Term, 1967
No. 358

IGNAZIO INTRAVAIA and I & I TRUCKING, INC.,
Petitioners,

vs.

W. WILLARD WIRTZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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W. WILLARD WIRTZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on March 15, 1967.

Citations to Opinion Below.

The Memorandum Opinion of the Trial Judge of the United States District Court, Southern District of California, Centra Division, who originally took the evidence in this case, the Honorable Harry C. Westover, is printed in Appendix A hereto, *infra*, App. p. 1. The opinion of the United States Court of Appeals for the Ninth Circuit, which said opinion was filed on

March 15, 1967 is printed in Appendix B hereto, *infra*, App. p. 6. To the knowledge of attorney for the petitioners, the opinion of the United States Court of Appeals for the Ninth Circuit has not yet been reported in any Federal Reporter.

Jurisdiction.

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on March 15, 1967. The jurisdiction of this court is invoked under 28 U.S.C. Section 1254(1).

Question Presented.

Are petitioners' employees engaged in the production of goods for commerce within the provisions of the Fair Labor Standards Act, 29 U.S.C. Sections 207, *et seq.* where the activities of the employees are entirely within the State of California and consist solely, in the transportation, entirely Intrastate, of rock, sand, gravel or coment to interstate facilities or to public streets which connect to interstate freeways?

Statutes Involved.

29 U.S.C. Sections 201 *et seq.* The sections are printed in Appendix C *infra*, App. pp. 16-55.

Statement.

This action was brought by W. Willard Wirtz, Secretary of Labor, United States Department of Labor, seeking to enjoin alleged violations by petitioners of over-time and record keeping requirements of the Fair Labor Standards Act, 29 U.S.C. Sections 201 *et seq.* The action proceeded upon an Amended Complaint

[C. T. pp. 89-91]. In Paragraph III of Respondent's Amended Complaint, it is alleged:

> "Defendant Ignazio Intravaia . . . employs about twenty-six employees who are engaged in the production of sand, gravel and cement for commerce. Defendant is a corporation . . . where, since subsequent to January, 1964, it has employed an undetermined number of employees who are engaged in the production of sand, gravel and cement for commerce." [C. T. p. 90].

The Amended Complaint further alleges in Paragraph IV thereof,

> "Defendants repeatedly have violated and are violating the provisions of Sections 7 and 15(a)-(2) of the Act by employing many of their employees in the production of goods for commerce etc . . ." [C. T. p. 90].

The Amended Complaint prayed for a permanent injunction enjoining petitioners, and each of them, from violating the provisions of Sections 15(a)(2) and 15-(a)(5) of the Act [C. T. p. 90].

For purposes of brevity, throughout this brief Ignazio Intravaia and I & I Trucking, Inc., will be referred to as "petitioners"; W. Willard Wirtz, Secretary of Labor, United States Department of Labor will be referred to as "respondent"; the Fair Labor Standards Act of 1938, 29 U.S.C. Sections 201 *et seq.* will be referred to as the "Act" unless specific reference to a particular section thereof is made.

Since respondent's injunction is sought under a Federal Statute, to wit: "The Act", it is pertinent to point out which statutory provisions are applicable upon

Angeles County, and the cement was picked up at a cement plant in either Riverside or San Bernardino Counties—all wholly within the Southern California area.

Congress did not intend the Fair Labor Standards Act should apply to *all* employees—even those remotely connected with interstate commerce. *Walling v. Goldblatt Bros., Inc.,* 128 F.2d 778. Plainly, on the contrary, it was the intent of Congress that the Act should apply to only those employees engaged in commerce or in the production of goods for commerce. *McLeod v. Threlkeld,* 319 U.S. 491.

In the case at bar there is no contention that defendants in any manner *produced* the "goods" or materials transported. The only issue in this case is whether the truck drivers were "engaged in commerce." In McLeod, supra, the Court said, at page 493

> "* * *. In the Fair Labor Standards Act, Congress did not intend that the regulation of hours and wages should extend to the furthest reaches of federal authority. The proposal to have the bill apply to employees 'engaged in commerce in any industry affecting commerce' was rejected in favor of the language, now in the act, 'each of his employees who is engaged in commerce or in the production of goods for commerce.' §§ 6 and 7. See the discussion and reference to legislative history in Kirschbaum Co. v. Walling, 316 U.S. 517, and Walling v. Jacksonville Paper Co. 317 U.S. 564. The selection of the smaller group was deliberate and purposeful."

Respondent takes the position that since the word "produced" includes transportation, any act of transportation would be an activity under which a court could properly find coverage under the "Act". A careful review of the statutory definition of "produced" makes it clear, however, that respondent is urging a distorted construction of the word "transported" consistent neither with accepted grammatical construction, the rule of *Ejusdem Generis,* nor the definition of transported as that phrase has been commonly understood.

Trial of this case was held in the courtroom of the Honorable Harry C. Westover, Judge Presiding, United States District Court, Southern District of California, Central Division on October 6th, 7th and 8, 1965. Evidence, both oral and documentary was had, briefs were filed and the matter was submitted. On November 23, 1965, Judge Westover ruled for the defendants and filed a Memoranum Opinion in which he arrived at the conclusion that plaintiff below (Wirtz) had failed to establish coverage under the provisions of the Fair Labor Standards Act. Notice of Appeal was filed on February 11, 1966. The judgment below was appealed to the United States Court of Appeals for the Ninth Circuit, arguments on appeal were had on October 5, 1966 and on March 15, 1967 the United States Court of Appeals for the Ninth Circuit the Honorable Justices Barnes, Duniway and Ely reversed the conclusions of the trial court and found that petitioners' employees were covered under the Fair Labor Standards Act.

Reasons for Granting the Writ.

1. The decision of the United States Court of Appeals for the Ninth Circuit relied heavily on the companion cases of *Alstate Const. Co. v. Durkin,* 1953, 345 U.S. 13, and *Thomas v. Hempt Bros.,* 1953, 345 U.S. 19. Upon the rationale of those cases, the United States Court of Appeals ruled that petitioners' employees were engaged in the production of goods for commerce, in reliance upon Section 203(j) of the Fair Labor Standards Act, 29 U.S.C. Sections 201 *et seq.*

We respectfully point out to the United States Supreme Court that the United States Court of Appeals has completely misread and misjudged the rationale of both *Alstate Const. Co. v. Durkin,* 1953, 345 U.S. 13 and *Thomas v. Hempt Bros.,* 1953, 345 U.S. 19. As pointed out in petitioners' brief below, in both the *Alstate* case and the *Thomas v. Hempt Bros.* case, *supra,* the employees involved both actively produced, then transported the commodities involved used in the construction of interstate highways. In the instant case, it was a stipulated fact that petitioners' employees produced nothing.

If the decision of the United States Court of Appeals in the instant case is not reviewed by the United States Supreme Court the question of whether transportation, entirely within the confines of a State, alone, constitutes the production of goods in interstate commerce within the meaning of the Fair Labor Standards Act remains in dispute and will be a constant source of controversy within the various United States District Court Circuits.

The United States Supreme Court is respectfully reminded that *Alstate v. Durkin,* the principal authority

relied upon by the United States District Court of Appeal in reversing the trial judge in the instant case, was a five to four decision productive of great controversy amongst the members of the United States Supreme Court even though, in the *Alstate* case, the employees both PRODUCED, then transported the commodities in question.

Further, the opinion of the United States Court of Appeals is not only inconsistent with the opinion of the United States Supreme Court in *Alstate Constr. Co. v. Durkin,* 1953, 345 U.S. 13, but represents a distortion of that opinion for purposes of affording unlimited coverage under the Fair Labor Standards Act and, therefore, is in direct violation of the opinion of the United States Supreme Court in *McLeod v. Threlkeld,* 319 U.S. 491, 87 L. Ed. 2d 1538, 63 S. Ct. 1248.

It has consistently been held that transportation alone not accompanied by any act of production does not afford coverage under the Fair Labor Standards Act.

United States v. Darby (1941), 312 U.S. 100, 85, L. Ed. 609, 61 S. Ct. 451;

E. C. Schroeder v. Clifton (1946), (Circuit Court of Appeals, Tenth Circuit), 153 F. 2d 385;

Walling v. Craig (1943), 53 F. Supp. 470;

Higgins v. Carr Bros. (1943), 317 U.S. 572, 63 S. Ct. 337;

Cederblade v. Parmelee Transportation Co., D.C. 111, 1947, 94 F. Supp. 965, aff'd 166 F. 2d 554;

Wirtz v. Dunmire (D.C.L.A. 1965), 239 F. Supp. 374;

Mateo v. Auto Rental Co., (C.A. Hawaii 1957), 240 F. 2d 831.

2. The question presented is of importance not only in the administration of the Fair Labor Standards Act but in advising a local trucking industry of its obligations under a Federal statute intended in its enactment to apply only to production of goods that moved in interstate commerce. The United States Supreme Court, in *McLeod v. Threlkeld* (1942), 319 U.S. 491, 87 L. Ed. 1538, 63 S. Ct. 1248, held that in enactment of the Fair Labor Standards Act Congress did not intend that the regulation of hours and wages should extend to the furthest reaches of Federal authority but, on the contrary, that the Fair Labor Standards Act had limited rather than unlimited coverage. In that opinion, the United States Supreme Court held that coverage under the Fair Labor Standards Act was not coextensive with the fullest power of Congress to regulate interstate activity.

Settlement of the question by the United States Supreme Court is plainly in the public interest since the opinion of the United States Court of Appeals in the instant case would seem to imply that every local activity involving an act of transportation becomes "production of goods in interstate commerce" within the meaning of the Fair Labor Standards Act. We ask the United States Supreme Court to bear in mind that all of the activities of petitioners herein were stipulated to be activities entirely within the confines of the State of California. Settlement of this question is further in the public interest in that it appears to petitioners that the United States Court of Appeals has acted in a legislative function rather than judicial function in ruling in this case for the decision has now expanded the coverage of the Fair Labor Standards Act to acts of transportation alone unconnected with the production of

goods. The decision of the United States Court of Appeals has opened a Pandora's box from which will spring findings of coverage as to every conceivable local activity. It is submitted that Congress, in its enactment of the Fair Labor Standards Act, clearly intended that coverage could be found only if petitioners' employees were engaged in the production of goods for commerce, 29 U.S.C. Section 201.

3. The decision of the court below is believed to be erroneous, and in direct conflict with not only *Alstate Const. Co. v. Durkin* (1953), 345 U.S. 13; *Thomas v. Hempt Bros.* (1953), 345 U.S. 19, but with *McLeod v. Threlkeld,* 319 U.S. 491, 87 L. Ed. 2d 1538, 63 S. Ct. 1248; *A. B. Kirschbaum Co. v. Walling* (1942), 316 U.S. 517, 86 L. Ed. 1638, 62 S. Ct. 1116; *Higgins v. Carr Bros.* (1943), 317 U.S. 572, 63 S. Ct. 337, and *United States v. Darby* (1941), 312 U.S. 100, 85 L. Ed. 609, 61 S. Ct. 451. The evidence in this case is overwhelming and uncontradicted that there was not transportation in interestate commerce whatsoever but simply acts of transportation which occurred entirely within the confines of the State of California.

It is well settled and fundamental in our jurisprudence that extension of coverage under a Federal statute enacted by the Congress of the United States is in the hands of legislature, not in the courts. It is submitted that the United States Court of Appeals not only misapplied the law but exceeded its authority in distorting and elaborating and enlarging unnecessarily the scope of coverage under the Fair Labor Standards Act so that now it would seem to embrace every conceivable local activity, rendering meaningless the power of the states to regulate local trucking activities.

The trial court below who heard this evidence ruled that there was no coverage. The United States Court of Appeals who did not review the evidence, did not comment on the evidence and indeed, pointed out in its opinion that the evidence was undisputed applied the evidence in this case to the law in a manner completely inconsistent with previous opinions of the United States Supreme Court. Petitioners submit that the function of the United States Court of Appeals, whether it be in the Ninth Circuit or any other Circuit of the United States, is to review the judgment of the trial court below for error only not to make new law in the furtherance of its own private concept of social justice.

Conclusion.

For the foregoing reasons, and each and every one of them, and in the interest of justice, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

MERRILL ALBERT,
Counsel for Petitioners.

APPENDIX A.

Memorandum Opinion.

United States District Court, Southern District of California, Central Division.

W. Willard Wirtz, Secretary of Labor, United States Department of Labor, Plaintiff, vs. Ignazio Intravaia and I & I Trucking, Inc., Defendants. No. 63-1318-HW.

Defendants are truckers; in the action at bar they are alleged to have hauled rock, sand and gravel, and cement from the place of production to various contractors engaged in constructing, repairing or rebuilding streets, roads and highways which lead directly or indirectly onto interstate highways.

Defendants' activities with reference to cement hauling consisted of driving a truck to a cement plant where the cement was loaded in bulk onto trucks owned by defendants; and the trucks were then driven to the job sites where the cement was dumped into a reservoir or container for subsequent use by the construction contractors in street and highway work.

The rock, sand and gravel were picked up by defendants' trucks at the place of origin, hauled by defendants' truckers to the contract sites and were dumped at the job site according to directions received by the truck drivers.

Defendants had no interest whatsoever in the cement, rock, sand and gravel except to see these items were transported from the place of origin to the place of use.

In addition to hauling to streets and highways job sites defendants trucked material to the March Field

Air Force Base where the transported materials were used in repairing or rebuilding runway surfaces. Again, defendants' sole interest in the materials hauled was transportation thereof from source of origin to the place of use.

The United States Supreme Court has held that employees repairing or building interstate highways are "engaged in commerce." Evidence in the case at bar discloses that all the streets and highways upon which work was performed with materials hauled by defendants' trucks were directly or indirectly connected with interstate highways.

Defendants did not pay truck drivers on an hourly or daily basis. Instead, defendants gave to the individual truck driver a very substantial part of the amount received for trucking each load of material. As a consequence, records were not kept showing the number of hours necessary for each trip, and defendants did not compensate drivers for work performed in excess of forty hours in any one week.

Contending defendants were not complying with the Fair Labor Standards Act, plaintiff filed this action to enforce compliance. Defendants deny that they come within the provisions of the Act.

Plaintiff relies upon *Alstate Construction Co. v. Durkin, etc.*, 345 U.S. 13, in which the Supreme Court was called upon to decide whether a road construction company engaged in the repair of roads, railroads and similar facilities within the State of Pennsylvania was within the coverage of the Fair Labor Standards Act. From the Alstate holding, we must conclude that employees of a contractor engaged in repair of roads and

highways connected with an interstate system come within the provisions of the Act.

In the case now before the court, however, the government is asking that coverage go one step further. It asks that this court hold not only will employees working upon roads, streets, and highways be covered but also within the coverage of the Act are employees of a trucking company which does no more than pick up and deliver materials to he job site for "covered" employees to use in their work.

This issue is discussed in the dissenting opinion of Alstate, supra, as follows (page 17)

> "The Court reasons that if the man who is building or repairing an interstate highway is 'engaged in commerce,' the one who carries cement and gravel to him from a nearby pit is 'engaged in the production of goods for commerce.' * * *."

The case at bar seems to be of first impression in the Ninth Circuit. The intrastate transportation industry of Southern California has been in existence in excess of fifty years and has not yet been held to be within the purview of the Fair Labor Standards Act.

If the employee-haulers in question here had been hired by the various contractors performing the actual street and highway work, or the runway work at March Field, this Court would have no hesitancy whatsoever in holding they came within the Act's coverage.

But the record before the Court shows all hauling involved here was for work performed upon streets and highways within the County of Los Angeles and upon the March Field runways in the County of Riverside; the rock, sand and gravel hauled were picked up in Los Angeles County for delivery to job sites in Los

which determination of coverage can be made. The "Act", covers petitioners' activities if and only if petitioners' employees were engaged in the following activities:

(1) petitioners' employees must be in an industry "engaged in commerce"; or

(2) petitioners' employees must be engaged in the production of goods for commerce.

29 United States Code, Section 201.

Since respondent has never contended that petitioners' employees are "engaged in commerce" coverage must be found, if at all, upon the proposition that petitioners' employees are "engaged in the production of goods for commerce". The "Act" contains definitions by which courts may ascertain the legislative intent of the statute and thus determine, under precise factual situations, whether coverage does or does not lie. As can be seen, respondent relies heavily on the statutory definition of "produced". The word "produced" is defined in the "Act" as follows:

> "(j) 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State." 29 U.S.C. Section 203(j).

It seems to this Court that if the Fair Labor Standards Act is to be extended to cover any and each individual who delivers materials to a street or highway which connects with an interstate route, the decision to so extend the Act should be made by Congress and not by the courts. If Congress wishes local haulers of materials, performing hauling wholly within a local area, to come within the Act's coverage, Congress can very readily so legislate.

Judgment is ordered for defendants. Counsel for defendants shall prepare Findings of Fact, Conclusions of Law, and Judgment in accordance with the rule, for presentation to the Court for signature on or before December 10, 1965.

Dated November 23rd, 1965.

Harry C. Westover
United States District Judge

APPENDIX B.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

W. Willard Wirtz, Sec. of Labor, US Dept. of Labor, *Appellant* v. Ignazio Intravaia, et al., *Appellee.* No. 20,856.

[March 15, 1967]

Appeal from the United States District Court for the Southern District of California, Central Division.

Before: Barnes, Duniway and Ely, Circuits Judges

Duniway, Circuit Judge:

The appellant, Secretary of Labor, brought this action to enjoin further violations of the overtime and record-keeping requirements of the Fair Labor Standards Act, 29 U.S.C. §§207 & 211(c). After a trial, the trial court concluded that appellees' employees were not within the coverage of the Act, and judgment was entered for appellees. We reserve.

The Act covers employees who are "engaged in commerce or in the production of goods for commerce," a phrase which recurs in many sections (29 U.S.C. §§202(a), 203(s), 206(a) (b), 207(a), 208(a), 212-(c)). The sole question presented is whether appellees' employees were "engaged . . . in the production of goods for commerce." This brings into play section 203(j):

> "'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this chapter an employee shall be deemed to have been en-

> gaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State."

We consider the facts in the light of these statutory provisions.

Most of the facts are stipulated; there is no substantial conflict in the evidence. Appellee Intravaia, with his wife, is owner of appellee I & I Trucking, Inc., a corporation. Both appellees have the same place of business, in El Monte, California. The business is hauling. Appellees employed about 26 people, about 20 of whom were drivers. These drivers used appellees' equipment to thaul sand, gravel, bulk cement, asphalt and other materials from points of origin to various contractors at construction sites. These contractors were engaged in building and repairing freeways, streets, roads, and highways. Some materials were also delivered to the Los Angeles International Airport and to the March Air Force Base to be used in the construction and improvement of runways. The bulk cement was picked up at cement plants and hauled to the sites and placed in bulk containers for later use by the contractors in making concrete. The sand, gravel and other materials were picked up at their origin and dumped at the construction sites, often directly on the roads at the direction of the contractors. All hauling was done within California. The materials were produced by others; they were processed by the contractors, not by appellees.

The freeways to which materials were hauled are used regularly for the transportation of goods and persons

in interstate commerce; the streets, roads and highways are traversed regularly by vehicles of the United States Post Office in the transportation of mail, and are used for the transportation of persons and goods in interstate commerce; the Los Angeles International Airport and March Air Force Base are used regularly for the transportation of persons and goods in interstate commerce.

The district court concluded that the employees were not covered by the Act. Its findings are in general terms, and are in part self-contradicting. Thus, paragraph III of the amended complaint alleges that appellees' employees "are engaged in the production of sand, gravel and cement for commerce." The court found that these allegations are true. It then found that the facts are substantially as recited above, that appellees are not engaged in the production of goods for commerce, and that neither appellees nor any of their employees are engaged in commerce. As a conclusion of law the court states that the employees are not engaged in the production of goods for commerce. It also found that appellees did not pay the drivers on an hourly or daily basis, but paid them "a very substantial part of the amount received for trucking each load," and that appellees did not keep records showing the number of hours necessary for each trip and did not compensate the drivers for work performed in excess of 40 hours per week.

It would appear, then, that if there is coverage, the Secretary is entitled to the injunction he seeks. He does not claim that the employees or appellees are engaged in commerce; his position is that they are engaged in the production of goods for commerce. He relies

heavily on section 203(j), quoted above. We think that he is right.

First, it bears emphasis that "the provisions of the Act expressly make its application dependent upon the character of the employees' activities. And, in any event, to the extent that his employees' are 'engaged in commerce or in the production of goods for commerce,' the employer is himself so engaged." (Frankfurter, J, in *A. B. Kirschbaum Co. v. Walling,* 1942, 316 U.S. 517 at 524) Or, as the court put it in *Mitchell v. Lublin, McGaughy & Associates,* 1959, 358 U.S. 207, 211: "we focus on the activities of the employees and not on the business of the employer." See also *Walling v. Jacksonville Paper Co.,* 1943, 317 U.S. 564; *Mitchell v. E. W. Vollmer & Co.,* 1955, 349 U.S. 427; *Wirtz v. Idaho Street Metal Works, Inc.,* 9 Cir. 1964, 335 F.2d 952.

It follows that it is immaterial that appellees do not in fact produce the commodities that they haul or do any processing of them in the course of hauling or after they are delivered. They may still be producing goods for commerce within the meaning of the Act: "Mere separation of the economic processes of production for commerce between different industrial units, even without any degree of common ownership, does not destroy the continuity of production for commerce." *D.A. Schulte Inc. v. Gangi,* 1946, 328 U.S. 108, 121. See also *Mitchell v. Hooper Equip. Co.,* 5 Cir., 1960, 279 F.2d 893, 896.

Second, the statute itself makes it clear that "production of goods for commerce" includes "transporting" goods for commerce. And decisions of the Supreme Court construing the statute, we think, require us to hold that appellees' employees are covered by the

Act. Most pertinent are the companion cases of *Alstate Const. Co. v. Durkin,* 1953, 345 U.S. 13; and *Thomas v. Hempt Bros.,* 1953, 345 U.S. 19. *Alstate* held that offsite employeees of a contractor who constructed and repaired interstate roads are covered. *Thomas* held that the quarry employees of a producer of cement who supplied those building interstate highways were also covered.

The reasoning of *Alstate* was that the employees actually on the site were "in commerce" under the decisions in *Overstreet v. North Shore Corp.,* 1943, 318 U.S. 125, and *Pedersen v. J. F. Fitzgerald Const. Co.,* 1943, 318 U.S. 740, and that therefore those producing goods for those working on interstate facilities were engaged in the production of goods for commerce: "In *Overstreet* we pointed out that interstate roads and railroads are indispensable 'instrumentalities' in the carriage of persons and goods that move in interstate commerce. We then held that because roads and railroads are in law and in fact integrated and indispensable parts of our system of commerce among the states, employees repairing them are 'in commerce.' Consequently he who serves interstate highways and railroads serves commerce. By the same token he who produces goods for these indispensable and inseparable parts of commerce produces goods for commerce." (345 U.S. at 16)

It should be noted that the company in *Alstate* manufactured the topping material to use in highway construction and repair; it quarried the materials and worked them up, then delivered the mix and put it down. There was no question that the workers on the site were covered by the Act; only the workers at the

quarry and those delivering the mix were in question. The drivers transporting the material to the scene of the highway construction were included in the opinion. This is clear from the fact that they were involved in the lower court's decision (see 95 F. Supp. at 587) and from the generality of the opinion in *Alstate*—all offsite employees of the company were involved in the coverage of the decision. That the drivers were included is emphasized by the restatement of the holding in Justice Douglas' dissent: "The Court reasons that if the man who is building or repairing an interstate highway is 'engaged in commerce,' the one who carries the cement and gravel to him from a nearby pit is 'engaged in the production of goods for commerce.'" (345 U.S. at 17) Thus *Alstate* tells us that the drivers who deliver road material from the manufacturing plant to the site are covered, at least if the one who is doing the manufacturing and the application employs the drivers. We mention these two conditions only because they are facts that were present and that are different from the facts at bar. They were not stressed by the Court as determinative of anything in the opinion, nor can we see their relevance in light of the opinions directing our attention to the activities of the employees.

In *Thomas* the Court held that employees who produce and handle the raw materials in its preparation for use on interstate transportation facilities are covered by the Act. This was on the authority of *Alstate,* decided the same day. The quarry owner in *Thomas* not only worked up the material for road work, but also hauled it to the sites. There is no distinction between employees in either *Alstate* or *Thomas,* and the two cases taken together cover employees who

haul road materials for employers who produce the material and put it on the road, and employees who haul the materials for producers who deliver to another company which puts it on the road.

The appellees, asking us to say that these cases do not cover the present case, insist that because the employer here did not actually make the material for application, the truck drivers, doing exactly the same job as the drivers in *Alstate* and *Thomas* are not covered. This, we think, flies in the face of the decisions that we have previously cited, that it is the activities of the employees that are controlling. In substance, appellees are asking us to hold that if the contractor working on the interstate facility in *Alstate* and the quarry owner supplying material to such a facility in *Thomas* had subcontracted their hauling, the employees of the subcontractor would not be covered by the Act. This is squarely contrary to the ruling in *D. A. Schulte Inc. v. Gangi,* which we have quoted above.

Finally, the Secretary asks us to rule upon a question of law that is stated in a pre-trial order:

> "If an employee is paid on a straight percentage or trip basis, with no payment of additional amounts for hours worked in excess of forty per week, but he earns a sum on such straight percentage or trip rate basis, which is in excess of the amount he would have earned had he worked an equal number of hours at the applicable union rate, have defendants violated 29 U.S.C. § 207."

The record, however, does not tell us whether the facts assumed in the question are true. We must decline what is really a request that we render an advisory

opinion. It will be for the trial court to determine, on remand, whether appellees have violated the overtime provisions of the Act. The findings do make it clear, and appellees admit, that they did not keep the records required.

The judgment is reversed and the matter is remanded for further proceedings consistent with this opinion.

Barnes, Circuit Judge, concurring:

I concur in the result reached by the majority.

Appellees' employees have been engaged in the hauling of sand, gravel and cement which ultimately go into the construction of roads and airport runways which are instrumentalities of interstate commerce. *Alstate Const. Co. v. Durkin,* 345 U.S. 13 (1953), makes it clear that essential elements which become a part of such instrumentalities are goods for commerce within the meaning of the Fair Labor Standards Act. Since appellees' employees are engaged in the "transportation" of such goods, under section 203(j) they are deemed to be engaged in the "production" of such goods. The conclusion must be that appellees' employees are engaged in the production of goods for commerce, and are therefore subject to the provisions of the Act.

I concur in the result because I feel that such a decision is required by *Alstate.* I cannot accede, however, to the majority's suggestion (last two sentences of second paragraph of the majority opinion) that we are only applying the statutory language to the facts of this case.

The exercise of reason does not reconcile the result we reach here with the power of Congress to regulate commerce "among the several States," U.S. Const. Art. I,

§ 8. There is a connection between appellees' activities and interstate commerce just as every human activity affects commerce in some slight way. But does that mean that Congress has the power to regulate every phase of human activity? I think not. Here there can be little doubt that appellees were not engaged in commerce "among the several States." Few would assert that Congress can be fiat "deem" a person to be within its commerce power unless that person is in fact engaged in interstate commerce, since Congress cannot grant itself powers and be consistent with the Tenth Amendment.

I do not suggest that this statute is unconstitutional as beyond the powers of Congress. Congress has limited the reach of this act to persons engaged in commerce or the production of goods for commerce, defining "commerce" in section 203(b) as "trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof." By its very terms the statute is within the commerce power. But I think we distort this language in reaching our conclusion.

Here it is reasonable to expect that the materials transported by appellees' employees will never leave the state of California. Congress by section 203(j) deems appellees' employees to be producers of these "goods", but the operative parts of the statute apply only if the goods are produced "for commerce" within the meaning of section 203(b). The sand, gravel and cement will never be traded, transported, transmitted or communicated among the several States or between any State and any place outside thereof. They will be mixed and spread upon the ground, and their function will be to

remain where they are placed for decades, perhaps centuries. Commerce within the meaning of the Fair Labor Standards Act may move over the road which they will become, but I can see no logical justification for saying that these goods are themselves "for commerce" among the several States within the meaning of either section 203(b) or Art. I, § 8.

Nevertheless, I concur in the court's result. In *Alstate* the Supreme Court decided that road building materials are goods produced for commerce within the meaning of the Fair Labor Standards Act. We are bound to accept and must follow that decision. The sole purpose in offering this separate discussion is to point out that the result is reached by following binding authority, rather than by interpreting a statute.

APPENDIX C.

29 U.S.C. Sections 201 through 211 (c).

§ 201. *Short title*

This chapter may be cited as the "Fair Labor Standards Act of 1938." June 25, 1938, c. 676, § 1, 52 Stat. 1060.

§ 202. *Congressional finding and declaration of policy*

(a) The Congress finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

(b) It is declared to be the policy of this chapter, through the exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power. June 25, 1938, c. 676, § 2, 52 Stat. 1060; Oct. 26, 1949, c. 736, § 2, 63 Stat. 910.

§ 203. *Definitions*

As used in this chapter—

(a) "Person" means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.

(c) "State" means any State of the United States or the District of Columbia or any Territory or possession of the United States.

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State (except with respect to employees of a State, or a political subdivision thereof, employed (1) in a hospital, institution, or school referred to in the last sentence of subsection (r) of this section, or (2) in the operation of a railway or carrier referred to in such sentence), or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(e) "Employee" includes any individual employed by an employer, except that such term shall not, for the purposes of subsection (u) of this section include—

(1) any individual employed by an employer engaged in agriculture if such individual is the parent, spouse, child, or other member of the employer's immediate family, or

(2) any individual who is employed by an employer engaged in agriculture of such individual (A) is employed as a hand harvest laborer and is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (B) commutes daily from his permanent residence to the farm on which he is employed, and (C) has been employed in agriculture less than thirteen weeks during the preceding calendar year.

(f) "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 1141j(g) of Title 12), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

(g) "Employ" includes to suffer or permit to work.

(h) "Industry" means a trade, business, industry, or branch thereof, or group of industries, in which individuals are gainfully employed.

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does

not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State.

(k) "Sale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

(l) "Oppresive child labor" means a condition of employment under which (1) any employee under the age of sixteen years is employed by an employer (other than a parent or a person standing in place of a parent employing his own child or a child in his custody under the age of sixteen years in an occupation other than manufacturing or mining or an occupation found by the Secretary of Labor to be particularly hazardous for the employment of children between the ages of sixteen and eighteen years or detrimental to their health or well-being) in any occupation, or (2) any employee between the ages of sixteen and eighteen years is employed by an employer in any occupation which the Secretary of Labor shall find and by order declare to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being; but oppressive child labor

shall not be deemed to exist by virtue of the employment in any occupation of any person with respect to whom the employer shall have on file an unexpired certificate issued and held pursuant to regulations of the Secretary of Labor certifying that such person is above the oppressive child-labor age. The Secretary of Labor shall provide by regulation or by order that the employment of employees between the ages of fourteen and sixteen years in occupations other than manufacturing and mining shall not be deemed to constitute oppressive child labor if and to the extent that the Secretary of Labor determines that such employment is confined to periods which will not interfere with their schooling and to conditions which will not interfere with their health and well-being.

(m) "Wage" paid to any employee includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees: *Provided,* That the cost of board, lodging, or other facilities shall not be included as a part of the wage paid to any employee to the extent it is excluded therefrom under the terms of a bona fide collective-bargaining agreement applicable to the particular employee: *Provided further,* That the Secretary is authorized to determine the fair value of such board, lodging, or other facilities for defined classes of employees and in defined areas, based on average cost to the employer or to groups of employers similarly situated, or average value to groups of employees, or other appropriate measures of fair value. Such evaluations, where applicable and

pertinent, shall be used in lieu of actual measure of cost in determining the wage paid to any employee. In determining the wage of a tipped employee, the amount paid such employee by his employer shall be deemed to be increased on account of tips by an amount determined by the employer, but not by an amount in excess of 50 per centum of the applicable minimum wage rate, except that in the case of an employee who (either himself or acting through his representative) shows to the satisfaction of the Secretary that the actual amount of tips received by him was less than the amount determined by the employer as the amount by which the wage paid him was deemed to be increased under this sentence, the amount paid such employee by his employer shall be deemed to have been increased by such lesser amount.

(n) "Resale" shall not include the sale of goods to be used in residential or farm building construction, repair, or maintenance: *Provided,* That the sale is recognized as a bona fide retail sale in the industry.

(o) Hours Worked.—In determining for the purposes of sections 206 and 207 of this title the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee.

(p) "American vessel" includes any vessel which is documented or numbered under the laws of the United States.

(q) "Secretary" means the Secretary of Labor.

(r) "Enterprise" means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units including departments of an establishment operated through leasing arrangements, but shall not include the related activities performed for such enterprise by an independent contractor: *Provided,* That, within the meaning of this subsection, a retail or service establishment which is under independent ownership shall not be deemed to be so operated or controlled as to be other than a separate and distinct enterprise by reason of any arrangement, which includes, but is not necessarily limited to, an agreement (1) that it will sell, or sell only, certain goods specified by a particular manufacturer, distributor, or advertiser, or (2) that it will join with other such establishments in the same industry for the purpose of collective purchasing, or (3) that it will have the exclusive right to sell the goods or use the brand name of a manufacturer, distributor, or advertiser within a specified area, or by reason of the fact that it occupies premises leased to it by a person who also leases premises to other retail or service establishments. For purposes of this subsection, the activities performed by any person or persons—

(1) in connection with the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or

gifted children, an elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit), or

(2) in connection with the operation of a street, suburban or interurban electric railway, or local trolley or motorbus carrier, if the rates and services of such railway or carrier are subject to regulation by a State or local agency (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit),

shall be deemed to be activities performed for a business purpose.

(s) "Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise which has employees engaged in commerce or in the production of goods for commerce, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person, and which—

(1) during the period February 1, 1967, through January 31, 1969, is an enterprise whose annual gross volume of sales made or business done is not less than $500,000 (exclusive of excise taxes at the retail level which are separately stated) or is a gasoline service establishment whose annual gross volume of sales is not less than $250,000 (exclusive of excise taxes at the retail level which are separately stated), and beginning February 1, 1969, is an enterprise whose annual gross volume of sales made or business done is not less than $250,-

000 (exclusive of excise taxes at the retail level which are separately stated);

(2) is engaged in laundering, cleaning, or repairing clothing or fabrics;

(3) is engaged in the business of construction or reconstruction, or both; or

(4) is engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, an elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit).

Any establishment which has as its only regular employees the owner thereof or the parent, spouse, child, or other member of the immediate family of such owner shall not be considered to be an enterprise engaged in commerce or in the production of goods for commerce or a part of such an enterprise, and the sales of such establishment shall not be included for the purpose of determining the annual gross volume of sales of any enterprise for the purpose of this subsection.

(t) "Tipped employee" means any employee engaged in an occupation in which he customarily and regularly receives more than $20 a month in tips.

(u) "Man-day" means any day during which an employee performs any agricultural labor for not less than one hour.

(v) "Elementary school" means a day or residential school which provides elementary education, as determined under State law.

(w) "Secondary school" means a day or residential school which provides secondary education, as determined under State law. As amended Sept. 23, 1966, Pub.L 89-601, Title I, §§ 101-103, Title II, § 215(a), 80 Stat. 830-832, 837.

§ 204. *Administrator*

(a) There is created in the Department of Labor a Wage and Hour Division which shall be under the direction of an Administrator, to be known as the Administrator of the Wage and Hour Division (in this chapter referred to as the "Administrator"). The Administrator shall be appointed by the President, by and with the advice and consent of the Senate.

(b) The Administrator may, subject to the civil-service laws, appoint such employees as he deems necessary to carry out his functions and duties under this chapter and shall fix their compensation in accordance with the Classification Act of 1949. The Administrator may establish and utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may appear for and represent the Administrator in any litigation, but all such litigation shall be subject to the direction and control of the Attorney General. In the appointment, selection, classification, and promotion of officers and employees of the Administrator, no political test or qualification shall be permitted or given consideration, but all such appointments and promotions shall be given and made on the basis of merit and efficiency.

(c) The principal office of the Administrator shall be in the District of Columbia, but he or his duly authorized representative may exercise any or all of his powers in any place.

(d) The Secretary shall submit annually in January a report to the Congress covering his activities for the preceding year and including such information, data, and recommendations for further legislation in connection with the matters covered by this chapter as he may find advisable. Such report shall contain an evaluation and appraisal by the Secretary of the minimum wages established by this chapter, together with his recommendations to the Congress. In making such evaluation and appraisal, the Secretary shall take into consideration any changes which may have occurred in the cost of living and in productivity and the level of wages in manufacturing, the ability of employers to absorb wage increases, and such other factors as he may deem pertinent.

(e) Whenever the Secretary has reason to believe that in any industry under this chapter the competition of foreign producers in United States markets or in markets abroad, or both, has resulted, or is likely to result, in increased unemployment in the United States, he shall undertake an investigation to gain full information with respect to the matter. If he determines such increased unemployment has in fact resulted, or is in fact likely to result, from such competition, he shall make a full and complete report of his findings and determinations to the President and to the Congress: *Provided,* That he may also include in such report information on the increased employment resulting from additional exports in any industry under this

chapter as he may determine to be pertinent to such report. June 25, 1938, c. 676, § 4, 52 Stat. 1061; Oct. 26, 1949, c. 736, § 4, 63 Stat. 911 [repealed]; Oct. 28, 1949, c. 782, Title XI, § 1106(a), 63 Stat. 972; Aug. 12, 1955, c. 867, § 2, 69 Stat. 711; July 31, 1956, c. 804, Title I, § 106 (a), 70 Stat. 737; May 5, 1961, Pub.L 87-30, § 3, 75 Stat. 66.

§ 205. *Special industry committees for Puerto Rico and the Virgin Islands*

(a) The Administrator shall as soon as practicable appoint a special industry committee to recommend the minimum rate or rates of wages to be paid under section 206 of this title to employees in Puerto Rico or the Virgin Islands, or in Puerto Rico and the Virgin Islands, engaged in commerce or in the production of goods for commerce or employed in any enterprise engaged in commerce or in the production of goods for commerce, or the Administrator may appoint separate industry committees to recommend the minimum rate or rates of wages to be paid under said section to employees therein engaged in commerce or in the production of goods for commerce or employed in any enterprise engaged in commerce or in the production of goods for commerce in particular industries. An industry committee appointed under this subsection shall be composed of residents of such island or islands where the employees with respect to whom such committee was appointed are employed and residents of the United States outside of Puerto Rico and the Virgin Islands. In determining the minimum rate or rates of wages to be paid, and in determining classifications, such industry committees shall be subject to the provisions of section 208 of this title.

(b) An industry committee shall be appointed by the Administrator without regard to any other provisions of law regarding the appointment and compensation of employees of the United States. It shall include a number of disinterested persons representing the public, one of whom the Administrator shall designate as chairman, a like number of persons representing employees in the industry, and a like number representing employers in the industry. In the appointment of the persons representing each group, the Administrator shall give due regard to the geographical regions in which the industry is carried on.

(c) Two-thirds of the members of an industry committee shall constitute a quorum, and the decision of the committee shall require a vote of not less than a majority of all its members. Members of an industry committee shall receive as compensation for their services a reasonable per diem, which the Administrator shall by rules and regulations prescribe, for each day actually spent in the work of the committee, and shall in addition be reimbursed for their necessary traveling and other expenses. The Administrator shall furnish the committee with adequate legal, stenographic, clerical, and other assistance, and shall by rules and regulations prescribe the procedure to be followed by the committee.

(d) The Administrator shall submit to an industry committee from time to time such data as he may have available on the matters referred to it, and shall cause to be brought before it in connection with such matters any witnesses whom he deems material. An industry committee may summon other witnesses or call upon the Administrator to furnish additional informa-

tion to aid it in its deliberations. June 25, 1938, c. 676, § 5, 52 Stat. 1062; June 26, 1940, c. 482, § 3(c), 54 Stat. 615; Oct. 26, 1949, c. 736, § 5, 63 Stat. 911; Aug. 12, 1955, c. 867, § 5(a), 69 Stat. 711; May 5, 1961, Pub.L. 87-30, § 4, 75 Stat. 67.

§ 206. *Minimum wage*

(a) Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates:

(1) not less than $1.40 an hour during the first year from the effective date of the Fair Labor Standards Amendments of 1966 and not less than $1.60 an hour thereafter, except as otherwise provided in this section;

(2) if such employee is a home worker in Puerto Rico or the Virgin Islands, not less than the minimum piece rate prescribed by regulation or order; or, if no such minimum piece rate is in effect, any piece rate adopted by such employer which shall yield, to the proportion or class of employees prescribed by regulation or order, not less than the applicable minimum hourly wage rate. Such minimum piece rates or employer piece rates shall be commensurate with, and shall be paid in lieu of, the minimum hourly wage rate applicable under the provisions of this section. The Administrator, or his authorized representative, shall have power to make such regulations or

orders as are necessary or appropriate to carry out any of the provisions of this paragraph, including the power without limiting the generality of the foregoing, to define any operation or occupation which is performed by such home work employees in Puerto Rico or the Virgin Islands; to establish minimum piece rates for any operation or occupation so defined; to prescribe the method and procedure for ascertaining and promulgating minimum piece rates; to prescirbe standards for employer piece rates, including the proportion or class of employees who shall receive not less than the minimum hourly wage rate; to define the term "home worker"; and to prescribe the conditions under which employers, agents, contractors, and subcontractors shall cause goods to be produced by home workers;

(3) if such employee is employed in American Samoa, in lieu of the rate or rates provided by this subsection or subsection (b) of this section, not less than the applicable rate established by the Secretary of Labor in accordance with recommendations of a special industry committee or committees which he shall appoint in the same manner and pursuant to the same provisions as are applicable to the special industry committees provided for Puerto Rico and the Virgin Islands by this chapter as amended from time to time. Each such committee shall have the same powers and duties and shall apply the same standards with respect to the application of the provisions of this chapter to employees employed in American Samoa as pertain to special industry committees established

under section 205 of this title with respect to employees employed in Puerto Rico or the Virgin Islands. The minimum wage rate thus established shall not exceed the rate prescribed in paragraph (1) of this subsection;

(4) if such employee is employed as a seaman on an American vessel, not less than the rate which will provide to the employee, for the period covered by the wage payment, wages equal to compensation at the hourly rate prescribed by paragraph (1) of this subsection for all hours during such period when he was actually on duty (including periods aboard ship when the employee was on watch or was, at the direction of a superior officer, performing work or standing by, but not including off-duty periods which are provided pursuant to the employment agreement); or

(5) if such employee is employed in agriculture, not less than $1 an hour during the first year from the effective date of the Fair Labor Standards Amendments of 1966, not less than $1.15 an hour during the second year from such date, and not less than $1.30 an hour thereafter.

(b) Every employer shall pay to each of his employees (other than an employee to whom subsection (a) (5) of this section applies) who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this section by the amendments made

to this chapter by the Fair Labor Standards of 1966, wages at the following rates:

(1) not less than $1 an hour during the first year from the effective date of such amendments,

(2) not less than $1.15 an hour during the second year from such date,

(3) not less than $1.30 an hour during the third year from such date,

(4) not less than $1.45 an hour during the fourth year from such date, and

(5) not less than $1.60 an hour thereafter.

(c) (1) The rate or rates provided by subsections (a) and (b) of this section shall be superseded in the case of any employee in Puerto Rico or the Virgin Islands only for so long as and insofar as such employee is covered by a wage order heretofore or hereafter issued by the Secretary pursuant to the recommendations of a special industry committee appointed pursuant to section 205 of this title.

(2) In the case of any such employee who is covered by such a wage order and to whom the rate or rates prescribed by subsection (a) of this section would otherwise apply, the following rates shall apply:

(A) The rate or rates applicable under the most recent wage order issued by the Secretary prior to the effective date of the Fair Labor Standards Amendments of 1966, increased by 12 per centum, unless such rate or rates are superseded by the rate or rates prescribed in a wage order issued by the Secretary pursuant to the recommendations of a review committee appointed under paragraph (C). Such rate or rates shall become effective

sixty days after the effective date of the Fair Labor Standards Amendments of 1966 or one year from the effective date of the most recent wage order applicable to such employee theretofore issued by the Secretary pursuant to the recommendations of a special industry committee appointed under section 205 of this title, whichever is later.

(B) Beginning one year after the applicable effective date under paragraph (A), not less than the rate or rates prescribed by paragraph (A), increased by an amount equal to 16 per centum of the rate or rates applicable under the most recent wage order issued by the Secretary prior to the effective date of the Fair Labor Standards Amendments of 1966, unless such rate or rates are superseded by the rate or rates prescribed in a wage order issued by the Secretary pursuant to the recommendations of a review committee appointed under paragraph (C).

(C) Any employer, or group of employers, employing a majority of the employees in an industry in Puerto Rico or the Virgin Islands, may apply to the Secretary in writing for the appointment of a review committee to recommend the minimum rate or rates to be paid such employees in lieu of the rate or rates provided by paragraph (A) or (B). Any such application with respect to any rate or rates provided for under paragraph (A) shall be filed within sixty days following the enactment of the Fair Labor Standards Amendments of 1966 and any such application with respect to any rate or rates provided for under

paragraph (B) shall be filed not more than one hundred and twenty days and not less than sixty days prior to the effective date of the applicable rate or rates under paragraph (B). The Secretary shall promptly consider such application and may appoint a review committee if he has reasonable cause to believe, on the basis of financial and other information contained in the application, that compliance with any applicable rate or rates prescribed by paragraph (A) or (B) will substantially curtail employment in such industry. The Secretary's decision upon any such application shall be final. Any wage order issued pursuant to the recommendations of a review committee appointed under this paragraph shall take effect on the applicable effective date provided in paragraph (A) and (B).

(D) In the event a wage order has not been issued pursuant to the recommendation of a review committee prior to the applicable effective date under paragraph (A) and (B), the applicable percentage increase provided by any such paragraph, shall take effect on the effective date prescribed therein, except with respect to the employees of an employer who filed an application under paragraph (C) and who files with the Secretary an undertaking with a surety or sureties satisfactory to the Secretary for payment to his employees of an amount sufficient to compensate such employees for the difference between the wages they actually receive and the wages to which they are entitled under this subsection. The Secretary shall be empowered to enforce such un-

dertaking and any sums recovered by him shall be held in a special deposit account and shall be paid, on order of the Secretary, directly to the employee or employees affected. Any such sum not paid to an employee because of inability to do so within a period of three years shall be covered into the Treasury of the United States as miscellaneous receipts.

(3) In the case of any such employee to whom subsection (a) (5) or subsection (b) of this section would otherwise apply, the Secretary shall within sixty days after the effective date of the Fair Labor Standards Amendments of 1966 appoint a special industry committee in accordance with section 205 of this title to recommend the highest minimum wage rate or rates in accordance with the standards prescribed by section 208 of this title but not in excess of the applicable rate provided by subsection (a) (5) or subsection (b) of this section, to be applicable to such employee in lieu of the rate or rates prescribed by subsection (a) (5) or subsection (b) of this section, as the case may be. The rate or rates recommended by the special industry committee shall be effective with respect to such employee upon the effective date of the wage order issued pursuant to such recommendation but not before sixty days after the effective date of the Fair Labor Standards Amendments of 1966.

(4) The provisions of sections 205 and 208 of this title, relating to special industry committees, shall be applicable to review committees appointed under this subsection. The appointment of a review committee shall be in addition to and not in lieu of any special industry committee required to be appointed pursuant

to the provisions of subsection (a) of section 208 of this title, except that no special industry committee shall hold any hearing within one year after a minimum wage rate or rates for such industry shall have been recommended to the Secretary by a review committee to be paid in lieu of the rate or rates provided for under paragraph (A) or (B). The minimum wage rate or rates prescribed by this subsection shall be in effect only for so long as and insofar as such minimum wage rate or rates have not been superseded by a wage order fixing a higher minimum wage rate or rates (but not in excess of the applicable rate prescribed in subsection (a) or subsection (b) of this section) hereafter issued by the Secretary pursuant to the recommendation of a special industry committee.

(d) (1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided,* That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

(2) No labor organization, or its agents, representing employees of an employer having employees subject to any provisions of this section shall cause or attempt to cause such an employer to discriminate against an employee in violation of paragraph (1) of this subsection.

(3) For purposes of administration and enforcement, any amounts owing to any employee which have been withheld in violation of this subsection shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this chapter.

(4) As used in this subsection, the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. June 25, 1938, c. 676, § 6, 52 Stat. 1062; June 26, 1940, c. 432, § 3(e), (f), 54 Stat. 616; Oct. 26, 1949, c. 736, § 6, 63 Stat. 912; Aug. 12, 1955, c. 867, § 3, 69 Stat. 711; Aug. 8, 1956, c. 1035, § 2, 70 Stat. 1118; May 5, 1961, Pub. L. 87-30, § 5, 75 Stat. 67; June 10, 1963, Pub.L. 88-38, § 3, 77 Stat. 56.

(e) (1) Notwithstanding the provisions of section 213 of this title (except subsections (a) (1) and (f) thereof), every employer providing any contract services (other than linen supply services) under a contract with the United States or any subcontract thereunder shall pay to each of his employees whose rate of pay is not governed by the Service Contract Act of 1965 or to whom subsection (a) (1) of this section is not applicable, wages at rates not less than the rates provided for in subsection (b) of this section.

(2) Notwithstanding the provisions of section 213 of this title (except subsections (a) (1) and (f) thereof) and the provisions of the Service Contract Act of 1965, every employer in an establishment providing linen supply services to the United States under a contract with the United States or any subcontract thereunder shall pay to each of his employees in such establishment wages at rates not less than those prescribed in subsection (b) of this section, except that if more than 50 per centum of the gross annual dollar volume of sales made or business done by such establishment is derived from providing such linen supply services under any such contracts or subcontracts, such employer shall pay to each of his employees in such establishment wages at rates not less than those prescribed in subsection (a) (1) of this section. As amended Sept. 23, 1966, Pub.L. 89-601, Title III, §§ 301-305, 80 Stat. 838-840.

§ 207. *Maximum hours*

(a) (1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(2) No employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in

an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this subsection by the amendments made to this Act by the Fair Labor Standards Amendments of 1966—

(A) for a workweek longer than forty-four hours during the first year from the effective date of the Fair Labor Standards Amendments of 1966,

(B) for a workweek longer than forty-two hours during the second year from such date, or

(C) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(b) No employer shall be deemed to have violated subsection (a) of this section by employing any employee for a workweek in excess of that specified in such subsection without paying the compensation for overtime employment prescribed therein if such employee is so employed—

(1) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that no employee shall be employed more than one thousand and forty hours during any period of twenty-six consecutive weeks; or

(2) in pursuance of an agreement, made as a result of collective bargaining by representatives

of employees certified as bona fide by the National Labor Relations Board, which provides that during a specified period of fifty-two consecutive weeks the employee shall be employed not more than two thousand two hundred and forty hours and shall be guaranteed not less than one thousand eight hundred and forty hours (or not less than forty-six weeks at the normal number of hours worked per week, but not less than thirty hours per week) and not more than two thousand and eighty hours of employment for which he shall receive compensation for all hours guaranteed or worked at rates not less than those applicable under the agreement to the work performed and for all hours in excess of the guaranty which are also in excess of the maximum workweek applicable to such employee under subsection (a) of this section or two thousand and eighty in such period at rates not less than one and one-half times the regular rate at which he is employed; or

(3) by an independently owned and controlled local enterprise (including an enterprise with more than one bulk storage establishment) engaged in the wholesale or bulk distribution of petroleum products if—

(A) the annual gross volume of sales of such enterprise is less than $1,000,000 exclusive of excise taxes,

(B) more than 75 per centum of such enterprise's annual dollar volume of sales is made within the State in which such enterprise is located, and

(C) not more than 25 per centum of the annual dollar volume of sales of such enterprise is to customers who are engaged in the bulk distribution of such products for resale,

and such employee receives compensation for employment in excess of forty hours in any workweek at a rate not less than one and one-half times the minimum wage rate applicable to him under section 206 of this title;

(c) For a period or periods of not more than ten workweeks in the aggregate in any calendar year, or fourteen workweeks in the aggregate in the case of an employer who does not qualify for the exemption in subsection (d) of this section, any employer may employ any employee for a workweek in excess of that specified in subsection (a) of this section without paying the compensation for overtime employment prescribed in such subsection if such employee (1) is employed by such employer in an industry found by the Secretary to be of a seasonal nature, and (2) receives compensation for employment by such employer in exeess of ten hours in any workday, or for employment by such employer in excess of fifty hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed.

(d) For a period or periods of not more than tem workweeks in the aggregate in any calendar year, or fourteen workweeks in the aggregate in the case of an employer who does not qualify for the exemption in subsection (c) of this section, any employer may employ any employee for a workweek in excess of that specified in subsection (a) of this sec-

tion without paying the compensation for overtime employment prescribed in such subsection, if such employee—

(1) is employed by such employer in an enterprise which is in an industry found by the Secretary—

(A) to be characterized by marked annually recurring seasonal peaks of operation at the places of first marketing or first processing of agricultural or horticultural commodities from farms if such industry is engaged in the handling, packing, preparing, storing, first processing, or canning of any perishable agricultural or horticultural commodities in their raw or natural state, or

(B) to be of a seasonal nature and engaged in the handling, packing, storing, preparing, first processing, or canning of any perishable agricultural or horticultural commodities in their raw natural state, and

(2) receives compensation for employment by such employer in excess of ten hours in any workday, or for employment in excess of forty-eight hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed.

(e) As used in this section the "regular rate" at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include—

(1) sums paid as gifts; payments in the nature of gifts made at Christmas time or on other spe-

cial occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency;

(2) payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours of employment;

(3) sums paid in recognition of services performed during a given period if either, (a) both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly; or (b) the payments are made pursuant to a bona fide profit-sharing plan or trust or bona fide thrift or savings plan, meeting the requirements of the Administrator set forth in appropriate regulations which he shall issue, having due regard among other relevant factors, to the extent to which the amounts paid to the employee are determined without regard to hours of work, production, or efficiency; or (c) the payments are talent fees (as such talent fees are defined and delimited by regulations of the Administrator) paid to performers, including announcers, on radio and television programs;

(4) contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees;

(5) extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of eight in a day or in excess of the maximum workweek applicable to such employee under subsection (a) of this section or in excess of the employee's normal working hours or regular working hours, as the case may be;

(6) extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days; or

(7) extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective-bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding the maximum workweek applicable to such employee under subsection (a) of this section,[1] where such premium rate is not less than one and one-half times the rate established in

good faith by the contract or agreement for like work performed during such workday or workweek.

(f) No employer shall be deemed to have violated subsection (a) of this section by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under subsection (a) of this section if such employee is employed pursuant to a bona fide individual contract, or pursuant to an agreement made as a result of collective bargaining by representatives of employees, if the duties of such employee necessitate irregular hours of work, and the contract or agreement (1) specifies a regular rate of pay of not less than the minimum hourly rate provided in subsection (a) or (b) of section 206 of this title (whichever may be applicable) and compensation at not less than one and one-half times such rate for all hours worked in excess of such maximum workweek, and (2) provides a weekly guaranty of pay for not more than sixty hours based on the rates so specified.

(g) No employer shall be deemed to have violated subsection (a) of this section by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under such subsection if, pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the work, the amount paid to the employee for the number of hours worked by him in such workweek in excess of the maximum workweek applicable to such employee under such subsection—

(1) in the case of an employee employed at piece rates, is computed at piece rates not less than

one and one-half times the bona fide piece rates applicable to the same work when performed during nonovertime hours; or

(2) in the case of an employee performing two or more kinds of work for which different hourly or piece rates have been established, is computed at rates not less than one and one-half times such bona fide rates applicable to the same work when performed during nonovertime hours; or

(3) is computed at a rate not less than one and one-half times the rate established by such agreement or understanding as the basic rate to be used in computing overtime compensation thereunder: *Provided,* That the rate so established shall be authorized by regulation by the Administrator as being substantially equivalent to the average hourly earnings of the employee, exclusive of overtime premiums, in the particular work over a representative period of time;

and if (i) the employee's average hourly earnings for the workweek exclusive of payments described in paragraphs (1)-(7) of subsection (e) of this section are not less than the minimum hourly rate required by applicable law, and (ii) extra overtime compensation is properly computed and paid on other forms of additional pay required to be included in computing the regular rate.

(h) Extra compensation paid as described in paragraphs (5)-(7) of subsection (e) of this section shall be creditable toward overtime compensation payable pursuant to this section.

(i) No employer shall be deemed to have violated subsection (a) of this section by employing any employee of a retail or service establishment for a workweek in excess of the applicable workweek specified therein, if (1) the regular rate of pay of such employee is in excess of one and one-half times the minimum hourly rate applicable to him under section 206 of this title, and (2) more than half his compensation for a representative period (not less than one month) represents commissions on goods or services. In determining the proportion of compensation representing commissions, all earnings resulting from the application of a bona fide commission rate shall be deemed commissions on goods or services without regard to whether the computed commissions exceed the draw or guarantee.

(j) No employer engaged in the operation of a hospital shall be deemed to have violated subsection (a) of this section if, pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the work, a work period of fourteen consecutive days is accepted in lieu of the workweek of seven consecutive days for purposes of overtime computation and if, for his employment in excess of eight hours in any workday and in excess of eighty hours in such fourteen-day period, the employee receives compensation at a rate not less than one and one-half times the regular rate at which he is employed. As amended Sept. 23, 1966, Pub.L. 89-601, Title II, §§ 204(c), (d), 212 (b), Title IV, §§ 401-403, 80 Stat. 835-837, 841, 842.

§ 208. *Wage orders in Puerto Rico and the Virgin Islands*

(a) The policy of this chapter with respect to industries or enterprises in Puerto Rico and the Virgin Islands engaged in commerce or in the production of goods for commerce is to reach as rapidly as is economically feasible without substantially curtailing employment the objective of the minimum wage prescribed in paragraph (1) of section 206(a) of this title in each such industry. The Administrator shall from time to time convene an industry committee or committees, appointed pursuant to section 205 of this title, and any such industry committee shall from time to time recommend the minimum rate or rates of wages to be paid under section 206 of this title by employers in Puerto Rico or the Virgin Islands, or in Puerto Rico and the Virgin Islands, engaged in commerce or in the production of goods for commerce or in any enterprise engaged in commerce or in the production of goods for commerce in any such industry or classifications therein. Minimum rates of wages established in accordance with this section which are not equal to the minimum wage rate prescribed in paragraph (1) of section 206(a) of this title shall be reviewed by such a Committee once during such biennial period, beginning with the biennial period commencing July 1, 1958, except that the Secretary, in his discretion, may order an additional review during any such biennial period.

(b) Upon the convening of any such industry committee, the Administrator shall refer to it the question of the minimum wage rate or rates to be fixed for such industry. The industry committee shall investigate conditions in the industry and the committee, or any authorized subcommittee thereof, shall after due notice hear such witnesses and receive such evidence as may be necessary or appropriate to enable the committee to perform its duties and functions under this chapter. The committee shall recommend to the Administrator the highest minimum wage rates for the industry which it determines, having due regard to economic and competitive conditions, will not substantially curtail employment in the industry, and will not give any industry in Puerto Rico or in the Virgin Islands a competitive advantage over any industry in the United States outside of Puerto Rico and the Virgin Islands.

(c) The industry committee shall recommend such reasonable classifications within any industry as it determines to be necessary for the purpose of fixing for each classification within such industry the highest minimum wage rate (not in excess of that prescribed in paragraph (1) of section 206(a) of this title) which (1) will not substantially curtail employment in such classification and (2) will not give a competitive advantage to any group in the industry, and shall recommend for each classification in the industry the highest minimum wage rate which the committee determines

will not substantially curtail employment in such classification. In determining whether such classifications should be made in any industry, in making such classifications, and in determining the minimum wage rates for such classifications, no classifications shall be made, and no minimum wage rate shall be fixed, solely on a regional basis, but the industry committee shall consider among other relevant factors the following:

(1) competitive conditions as affected by transportation, living, and production costs;

(2) the wages established for work of like or comparable character by collective labor agreements negotiated between employers and employees by representatives of their own choosing; and

(3) the wages paid for work of like or comparable character by employers who voluntarily maintain minimum wage standards in the industry.

No classification shall be made under this section on the basis of age or sex.

(d) The industry committee shall file with the Secretary a report containing its findings of fact and recommendations with respect to the matters referred to it. Upon the filing of such report, the Secretary shall publish such recommendations in the Federal Register and shall provide by order that the recommendations contained in such report shall take effect upon the expiration of 15 days after the date of such publication.

(e) Orders issued under this section shall define the industries and classifications therein to which they are to apply, and shall contain such terms and conditions as the Administrator finds necessary to carry out the purposes of such orders, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rates established therein.

(f) Due notice of any hearing provided for in this section shall be given by publication in the Federal Register and by such other means as the Administrator deems reasonable calculated to give general notice to interested persons. June 25, 1938, c. 676, § 8, 52 Stat. 1064; Oct. 26, 1949, c. 736, § 8, 63 Stat. 915; Aug. 12, 1955, c. 867, §§ 4, 5(b)-(e), 69 Stat. 711, 712; Aug. 25, 1958, Pub.L. 85-750, 72 Stat. 844; May 5, 1961, Pub.L. 87-30, § 7, 75 Stat. 70.

§ 209. *Attendance of witnesses*

For the purpose of any hearing or investigation provided for in this chapter, the provisions of sections 49 and 50 of Title 15 (relating to the attendance of witnesses and the production of books, papers, and documents), are made applicable to the jurisdiction, powers, and duties of the Administrator, the Secretary of Labor, and the industry committees. June 25, 1938, c. 676, § 9, 52 Stat. 1065; 1946 Reorg.Plan No. 2, § 1, eff. July 16, 1946, 11 F.R. 7873, 60 Stat. 1095.

§ 210. *Court review*

(a) Any person aggrieved by an order of the Secretary issued under section 208 of this title may ob-

tain a review of such order in the United States Court of Appeals for any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within 60 days after the entry of such order a written petiton praying that the order of the Secretary be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to the Secretary, and thereupon the Secretary shall file in the court the record of the industry committee upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part, so far as it is applicable to the petitioner. The review by the court shall be limited to questions of law, and findings of fact by such industry committee when supported by substantial evidence shall be conclusive. No objection to the order of the Secretary shall be considered by the court unless such objection shall have been urged before such industry committee or unless there were reasonable grounds for failure so to do. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence may materially affect the result of the proceeding and that there were reasonable grounds for failure to adduce such evidence in the proceedings before such in-

dustry committee, the court may order such additional evidence to be taken before an industry committee and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. Such industry committee may modify the initial findings by reason of the additional evidence so taken, and shall file with the court such modified or new findings which if supported by substantial evidence shall be conclusive, and shall also file its recommendations, if any, for the modification of the original order. The judgment and decree of the court shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28.

(b) The commencement of proceedings under subsection (a) of this section shall not, unless specifically ordered by the court, operate as a stay of the Administrator's order. The court shall not grant any stay of the order unless the person complaining of such order shall file in court an undertaking with a surety or sureties satisfactory to the court for the payment to the employees affected by the order, in the event such order is affirmed, of the amount by which the compensation such employees are entitled to receive under the order exceeds the compensation they actually receive while such stay is in effect. June 25, 1938, c. 676, § 10, 52 Stat. 1065; Aug. 12, 1955, c. 867, § 5(f), 69 Stat. 712; Aug. 28, 1958, Pub.L. 85-791, § 22, 72 Stat. 948.

§ 211. *Investigations, inspections, records, and homework regulations*

(a) The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this chapter, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this chapter, or which may aid in the enforcement of the provisions of this chapter. Except as provided in section 212 of this title and in subsection (b) of this section, the Administrator shall utilize the bureaus and divisions of the Department of Labor for all the investigations and inspections necessary under this section. Except as provided in section 212 of this title, the Secretary of Labor shall bring all actions under section 217 of this title to restrain violations of this chapter.

(b) With the consent and cooperation of State agencies charged with the administration of State labor laws, the Administrator and the Secretary of Labor may, for the purpose of carrying out their respective functions and duties under this chapter, utilize the services of State and local agencies and their employees and, notwithstanding any other provision of law, may reimburse such State and local agencies and their employees for services rendered for such purposes.

(c) Every employer subject to any provision of this chapter or of any order issued under this chapter shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this chapter or the regulations or orders thereunder.

(d) The Administrator is authorized to make such regulations and orders regulating, restricting, or prohibiting industrial homework as are necessary or appropriate to prevent the circumvention or evasion of and to safeguard the minimum wage rate prescribed in this chapter, and all existing regulations or orders of the Administrator relating to industrial homework are continued in full force and effect. June 25, 1938, c. 676, § 11, 52 Stat. 1006; 1946 Reorg.Plan No. 2, § 1, eff. July 16, 1946, 11 F.R. 7873, 60 Stat. 1095; Oct. 26, 1949, c. 736, § 9, 63 Stat. 916.

BRIEF IN OPPOSI - TION TO PETITION FOR A WRIT OF CERTIORARI

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 358

IGNAZIO INTRAVAIA AND I & I TRUCKING, INC.,
PETITIONERS

v.

W. WILLARD WIRTZ, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The petition for writ of certiorari should be denied because it was not timely filed.

The judgment of the court of appeals was entered on March 15, 1967. No extension of time was sought or obtained. The petition for a writ of certiorari was delivered to the Clerk on June 14, 1967, ninety-one days after the entry of judgment in the court of

appeals, but the certified copy of the record was not delivered to the Clerk until July 13, 1967, and thus the petition was not filed until that date. Thus, the petition for certiorari was not filed until approximately 120 days after the judgment of the court of appeals, and long after the statutory ninety days limitation for filing a petition. 28 U.S.C. 2101(c); Rule 22(3) of the Rules of this Court. The petition was untimely and the Court has no jurisdiction to entertain it.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

AUGUST 1967

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